Supreme Court, U.S.
FILED
AUG 13 1999
OFFICE OF THE CLERK

No. 99-121

In The

Supreme Court of the United States

KATIE R. HARDIN,

Petitioner,

v.

S.C. JOHNSON & SON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT S.C. JOHNSON & SON, INC.'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Was summary judgment dismissing Petitioner's Title VII sexual and racial harassment claims appropriately granted and affirmed where: 1) the alleged mistreatment of Petitioner by her coworker was neither sexual nor racial; 2) the undisputed facts confirmed that the coworker directed his coarse language and other rude conduct equally at all coworkers, including white men, white women, black men and black women; 3) the alleged harassing conduct was not severe or pervasive enough to constitute an actionable hostile work environment; and 4) Respondent dealt reasonably with Petitioner's complaints by promptly investigating them and implementing remedial measures reasonably calculated to eliminate the rude conduct?

2. Was summary judgment dismissing Petitioner's race discrimination claim pursuant to 42 U.S.C. § 1981 appropriately granted and affirmed where there was no evidence that Respondent treated Petitioner's complaints any less solicitously because of her race?

RULE 29.6 CORPORATE DISCLOSURE LIST

S.C. Johnson & Son, Inc. has no parent company. S.C. Johnson & Son, Inc. does own less than one hundred percent of certain subsidiary companies. These are:

Name	Country
Johnsonwax del Ecuador S.A.	Ecuador
Shanghai Johnson Ltd.	China
Saudi Johnson Company, Ltd.	Saudi Arabia
Johnson Trading Company, Limited	Japan
Johnson Wax (Egypt) Co.	Egypt
Johnson's Wax (East Africa) Ltd.	East Africa
Johnson Wax Nigeria Limited	Nigeria
Lever Johnson (Consumer Products) Limited	India
Johnson's Wax Ltd.	Ghana
PT SC Johnson & Son (Indonesia) Ltd.	Indonesia
S.C. Johnson Risk Management, Inc.	USA
Johnson Polymer Corporation	Japan
Esuco Beheer B.V.	Netherlands
Johnson Chemical Company	Japan

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent S.C. Johnson & Son, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Katie R. Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340 (7th Cir. No. 98-2058, Jan. 28, 1999).

COUNTERSTATEMENT OF THE CASE

This is a garden-variety harassment case in which the Petitioner complains about the rude behavior of one of her former coworkers. The Magistrate Judge, the District Court, and the Court of Appeals for the Seventh Circuit all agreed that Petitioner's Title VII claim must be dismissed on summary judgment because there were no facts in the record to show that the coworker was rude to Petitioner *because of* her sex or her race, and, in any event, the coworker's alleged misconduct was not sufficiently severe or pervasive to constitute an actionable hostile work environment. The District Court further concluded that summary judgment dismissing Petitioner's Title VII claim was required because S.C. Johnson acted reasonably in responding to Petitioner's complaints. Finally, the courts below uniformly agreed that Petitioner presented no facts to support a race discrimination claim pursuant to 42 U.S.C. § 1981.

I. BACKGROUND FACTS

A. Introduction Of The Relevant Persons

Petitioner Katie Hardin is a black female. (R. 40, ¶ 1)[1] Respondent S.C. Johnson & Son, Inc. (hereafter "S.C.

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[1] "R. 40" refers to the proposed findings of fact submitted by S.C. Johnson with its motion for summary judgment, which

(*footnote continued on next page*)

Johnson" or the "Company") manufactures and sells various personal care products. S.C. Johnson employed Hardin as an hourly production worker at its factory in Wisconsin beginning in 1972. Between 1972 and 1988, Hardin worked in various divisions or areas of that plant. In 1988, she transferred to line 374, a production line in the aerosol production area, and she remained on line 374 from 1988 through June 1995. (R. 40, ¶¶ 3-6, 29-31)

The only person that Hardin accused of harassing her was a coworker named Nels Andersen. Hardin first encountered Andersen during the time period from 1978 to 1988 when she would occasionally be assigned to the particular area where Andersen then worked. When Hardin transferred to line 374 in 1988, Andersen was already assigned to that line. They both worked on that production line through February 1995. (R. 40, ¶¶ 33, 37-38, 181)

Between 1988 and June 1993, Andersen served as the "line chief" for line 374. (R. 40, ¶ 33) The line chief, like the other production workers, was an hourly employee

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was identified as item 40 in the appellate court record. Local Rule 6.05 of the United States District Court for the Eastern District of Wisconsin requires a movant seeking summary judgment to set forth proposed findings of all facts necessary to the entry of judgment in movant's favor. Local Rule 6.05 permits the party opposing the motion to attempt to raise genuine issues of dispute with any such proposed findings, requiring citation to specific admissible evidence in the record. Any proposed finding that is not disputed by reference to admissible evidence that raises a genuine issue of disputed fact is deemed admitted. In this case, Hardin expressly conceded the vast majority of S.C. Johnson's proposed findings. (*See* R. 48, Plaintiff's Response to Proposed Findings) Hardin's responses that did purport to dispute particular proposed findings were comprehensively addressed and refuted in S.C. Johnson's reply materials. (R. 61) The courts below relied extensively in their opinions on the facts proposed by S.C. Johnson, finding them to be undisputed.

and was not a member of management. The line chief was not the supervisor of the other production workers on the line – the line chief had no authority to hire or fire employees, could not issue discipline, could not do performance evaluations and could not determine any pay increases or other benefits for any of the other employees. A salaried, management employee called the "unit manager" performed those supervisory duties. Rather, the line chief was the lead hourly worker on a production line with duties such as implementing line change-overs, promoting quality and safety, and organizing and scheduling the crew members. (R. 40, ¶¶ 7, 10-12)

In June 1993, the position of line chief was eliminated when S.C. Johnson reorganized its production operations into a work-team operation. Upon the implementation of the work-team concept, the scheduling and other administrative duties previously performed by the line chief then were performed by the member of the team chosen by the other production employees on the team to function in the "administrative role." Like the line chief position, the administrative role was not a supervisory position. Instead, the unit manager, now called the "coach," still was the supervisor of the team members. (R. 40, ¶¶ 13, 16, 18)

B. Facts Concerning Andersen's Alleged Misconduct Toward Hardin And Others

Hardin claimed that Andersen mistreated her before she transferred to line 374 in 1988. She alleged that on some occasions during the 1978-88 time frame when Hardin worked on a sporadic basis with Andersen she occasionally heard Andersen say "What the hell is going on? What the hell are you doing? Shit. Get your head out of your ass" when something went wrong on the production line. Hardin also claimed that Andersen touched her 20 to 25 times on her shoulder and on her arm during the

1978 to 1988 time period before she joined line 374. Hardin testified that she believed Andersen's conduct was racial and sexual harassment of her as far back as 1988. (R. 40, ¶¶ 40, 45, 46) However, Hardin conceded that Andersen did the same things to anybody who was working on the line, including both men and women, and both black and white employees. (R. 40, ¶¶ 40-46)

Hardin alleged that Andersen continued to be rude to her and used coarse language in her presence after she joined line 374 in 1988. For example, Hardin claimed that when a machine on the production line broke down, Andersen would come over and jump in to start doing things to fix the machine, and would curse in anger, using words like "hell," "ass," "fuck," and "shit." She did not allege that Andersen specifically referred to her with these words. Hardin also alleged that when she had problems on the production line, Andersen would say "Why the hell aren't you doing your job? Do you know how to do your job?", and that Andersen would accuse her of taking a long break and ask her "Where in the hell" she was. Hardin claimed that from 1988 to 1993 Andersen used these swear words sometimes on a weekly basis, and sometimes even less frequently when a month would go by without Andersen swearing or cursing. (R. 40, ¶¶ 47-50, 58-59)

Although Hardin alleged that this conduct was gender or race-based harassment of her, she admitted that she had no factual basis for her claim that Andersen's cursing was sex or race harassment other than *her belief* that Andersen cursed in front of the women on line 374 more than he did in front of the men on the line. (R. 40, ¶¶ 61, 67, 68) However, Hardin admitted that she was not in a position to observe Andersen's behavior toward the other employees on line 374 on a regular basis. (R. 40,

¶ 75)[2] Because Hardin could not see or hear what was happening on other parts of the line even when she was working there, she admitted that she had no idea how often Andersen cursed at the women on the line compared to the men. (R. 40, ¶ 73) Hardin conceded, though, that between 1988 and 1993, even from her limited view, she observed Andersen cursing at the men on line 374. Hardin specifically witnessed Andersen curse at white men as well as black men or line 374. Hardin also observed Andersen treating the white women on line 374 the same way he treated her in terms of cursing. (R. 40, ¶¶ 63-64, 69-70, 77) Hardin testified that Andersen's cursing ended sometime in 1993 after he was warned about such behavior. (R. 40, ¶¶ 78-79)[3]

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[2] A person cannot see what is happening at other stations on line 374 from their work station because the line is very long and covers two stories of the production facility. Moreover, the work environment all around line 374 is noisy, and all employees working on the line and visitors to the line are required to wear earplugs. (R. 40, ¶¶ 71-72, 74)

[3] Hardin erroneously states in her Petition that Andersen continued to curse and yell at black women on the production line even after she complained to her supervisor and filed a written complaint in approximately March 1993. (Pet. at 5) However, this directly contradicts the undisputed facts in the evidentiary record. For example, S.C. Johnson's Proposed Finding of Fact 79 stated:

> Andersen's cursing stopped in 1993 because the Company's management gave Andersen a stern warning and told him that his behavior had to stop, and told him to avoid Plaintiff and not talk to her unless he absolutely had to. (Hardin Depo. p. 122)

(R. 40, ¶ 79) Hardin expressly conceded that there was no dispute and no genuine issue of material fact with respect to this proposed finding. (R. 48, ¶ 79)

(footnote continued on next page)

Hardin admitted that she never heard Andersen make any type of remark that was in any way derogatory to blacks. The other black female workers on line 374 similarly testified that they never heard Andersen make any racial comments. (R. 40, ¶¶ 86, 108-109) The only comment that Hardin claimed Andersen made that Hardin believed was a sexual remark was a single instance in which a woman on the line was having problems with her machine and Andersen allegedly called her a "dumb blonde." Hardin never heard Andersen make any other remarks that Hardin considered to be sexual. (R. 40, ¶¶ 87, 88)

In addition to the cursing, Hardin claimed that, between 1988 and January 1993, Andersen touched her on her neck and her shoulders, would sometimes put his arm around her, and once touched the bottom of her foot. Hardin admitted that Andersen's alleged touching of her stopped by January of 1993. (R. 40, ¶¶ 80, 81)

Hardin did not believe and did not contend that Andersen's touching her was race harassment; however,

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In the same part of the Petition, Hardin erroneously claims that Andersen did not "yell at white women temporary workers and did not curse at other men." (Pet. at 5) This, too, contradicts the undisputed factual record. For example, S.C. Johnson proposed the following findings of fact:

> 70. Hardin observed Andersen curse at white men as well as black men on line 374. (Harden Depo. p. 119)
>
> 76. Between 1988 and 1993, sometimes white women worked on line 374. (Hardin Depo. p. 121)
>
> 77. Plaintiff observed Andersen treating the white women on line 374 the same way he treated plaintiff in terms of cursing. (Hardin Depo. pp. 121-122)

(R. 40, ¶¶ 70, 76-77) Again, Hardin conceded that there was no factual dispute or genuine issue regarding these proposed findings. (R. 48, ¶¶ 70, 76-77)

she claimed it was sexual harassment. Hardin's only bases for her claim that Andersen's touching of her was sexual harassment was that she did not want the touching, that she was a woman, and that she "once" told him to stop. However, Hardin admitted that, even with her limited ability to view Andersen's interactions with other coworkers, she saw Andersen touch the shoulders of at least two other male employees on line 374 during the same time period. (R. 40, ¶¶ 83-85)

C. Hardin's Complaints And S.C. Johnson's Responses

Hardin first made a complaint about Andersen's conduct sometime in 1989, when she, along with co-employees Marsha Russell (white female), Marian Barootian (Hispanic female) and Leevora Perry (black female) together told their supervisor, Richard Konieczko,[4] that Andersen was treating the women on the line poorly by being disrespectful and by cursing and throwing things.[5] The group did not tell Konieczko what particular words Andersen used, but said that they did not see the need for his use of profanity. In response to these comments, Konieczko confronted Andersen, told him that members of the crew did not like his use of profanity, and

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[4] Hardin incorrectly identifies her supervisor to whom she and the three other women complained about Andersen in 1989 as "Ronald Klimowicz." (Pet. at 3-4) Actually, Ronald Klimowicz first became Petitioner's supervisor in approximately early 1993. (R. 40, ¶¶ 101, 102, 92)

[5] Petitioner misleadingly asserts that these women complained to their supervisor that Andersen threw things *at* them. (Pet. at 4) The record contains some evidence that Andersen sometimes threw things around when angry about some disruption to the production process, but there is no evidence that Andersen threw items *at* people, or that anyone complained that he did.

instructed him to stop the unacceptable language in the workplace. After the one instance in the fall of 1989, none of the women on line 374 ever complained again to Konieczko about Andersen. (R. 40, ¶¶ 92, 94, 96, 99)

The next time Hardin made any complaint about Andersen was not until over three years later, in early 1993. (R. 40, ¶ 101) Hardin complained to her supervisor, Ron Klimowicz, that Andersen cursed and yelled at the workers on the line, and that she had told Andersen "Don't touch me anymore." (R. 40, ¶¶ 102, 110, 117-118) Hardin testified that Klimowicz was receptive to her complaint about Andersen. (R. 40, ¶ 114) In response to Hardin's complaint, Klimowicz warned Andersen at a team meeting that any cursing or disrespectful behavior was not acceptable and had to stop, and made Andersen apologize to the team for his cursing and yelling. Klimowicz also issued Andersen a written warning. (R. 40, ¶¶ 104, 123, 127) Klimowicz informed Hardin that he had given Andersen the written warning, and instructed Hardin to tell him if Andersen gave her any more problems. (R. 40, ¶¶ 111, 165) After March 1993, Klimowicz received no further complaints from Hardin about Andersen. (R. 40, ¶ 129)

On March 9, 1993, Hardin spoke to Sherry Johnson in S.C. Johnson's Human Resources Department about Andersen. (R. 40, ¶ 130) Although Hardin's main complaints were that Andersen called her a liar and told her to transfer to another line, Hardin also told Johnson that Andersen used swear words, yelled at her for coming back late from a break, and did not treat the men on the line that way. (R. 40, ¶¶ 134, 138) Over the course of the next few days, Johnson investigated Hardin's complaint by interviewing Hardin's supervisor, Klimowicz, interviewing the alleged harasser, Andersen, and following up with Hardin. (R. 40, ¶¶ 146-154)

On April 13, 1995, Hardin filed a written complaint with Steve Price, who was Johnson's boss in the Human

Resources Department. In this complaint, Hardin claimed she was being sexually harassed, but that written complaint did not contain anything new or different from the substance of the complaint Hardin made orally to Johnson in their March 9, 1993 meeting. (R. 40, ¶¶ 155-158)

Johnson and Price both followed up with Hardin separately and informed Hardin of the way in which her complaint was handled, including the fact that a disciplinary warning had been given to Andersen and was documented in his personnel file. Hardin told both Johnson and Price separately that she was satisfied with the way that the Human Resources Department had handled her complaint. Johnson and Price each told Hardin that she should contact them immediately if anything else should happen. (R. 40, ¶¶ 160-161, 163, 166-167) Hardin never complained again to Johnson or Price.

The next time after the spring of 1993 that Hardin made any complaint to anyone in S.C. Johnson's management about Andersen's conduct was in 1995, two years after her last complaint. Hardin complained to recently appointed Human Resources Director James Frederick in February 1995 that she perceived she was treated differently by Andersen because she was a black woman. (R. 40, ¶¶ 168-169, 171) In response to Hardin's claim, Frederick conducted an investigation that included, among other things, his interviews of the black employees on line 374, both males and females. (R. 40, ¶ 172) ***None of the other black employees interviewed by Frederick indicated that they believed that they were being discriminated against because of their race.*** (R. 40, ¶ 176)

Also in February, 1995 Hardin called the President of the Company, William Perez, to complain about Andersen. Perez told Hardin that he would check into her complaints and would call her back. Perez spoke to Frederick about Hardin's claims and the decision was made to move Andersen to another production line. Frederick also warned Andersen that any further inappropriate

conduct would result in significant further discipline, including termination of his employment. As promised, Perez called Hardin back and informed her that Andersen had been moved and that her complaint was documented in Andersen's file. Hardin testified that she was satisfied with S.C. Johnson's response to her complaint to Perez. She also admitted that, as of February 1995, there was nothing else that she wanted done with respect to Andersen. (R. 40, ¶¶ 178, 180-181, 183-185, 187)

On June 1, 1995, Hardin learned that Mildred Hubbard-Goodwin, a black female coworker, had assigned Andersen to work an overtime shift on line 374 on Saturday, June 3, 1995. Hardin chose not to come to work on June 3, 1995 and suffered no adverse consequences for failing to come to work. (R. 40, ¶¶ 191-195)

In a meeting on Monday, June 5, 1995, with the plant manager, Jim Potochick, and the human resources director, Jim Frederick, among others, Hardin complained about Andersen being assigned for overtime on the same line as she was assigned. Hardin also claimed that Andersen had startled her by coming up behind her in an electric cart and passing within a few feet of her without warning, letting a door slam in front of her, and cutting her car off in the parking lot. Although all of this alleged conduct occurred months earlier, before Andersen had been moved off of line 374 in February 1995, Hardin did not inform the Company of it until this meeting on June 5, 1995. (R. 40, ¶¶ 196-198, 200)

Potochick and Frederick told Hardin that the Company would only rarely assign Andersen to work on the same line, and if it ever happened, Hardin would be informed ahead of time and would be given the option of whether or not to work with Andersen. (R. 40, ¶ 199) Hardin never again raised any complaints about Andersen.

II. THE PROCEEDINGS BELOW

Hardin filed her administrative charge of discrimination in June 1995, followed by her complaint in federal court on September 14, 1995. She alleged that she suffered a sexually and racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. She also asserted a race discrimination claim pursuant to 42 U.S.C. § 1981, but did not pursue a hostile work environment theory under this statute. Instead, she alleged only that S.C. Johnson intentionally discriminated against her because of her race by responding to her harassment complaints less aggressively than it would have responded to those complaints if she were a white woman.

On March 9, 1998, United States Magistrate Judge Aaron E. Goodstein issued his recommendation that S.C. Johnson's motion for summary judgment be granted and Hardin's claims be dismissed. With respect to Hardin's Title VII claims, the Magistrate Judge first held that Hardin could only base her claims on alleged harassment occurring within Title VII's 300-day statute of limitations period. He rejected Hardin's argument that the "continuing violation" theory should be used to expand the limitations period, reasoning that because Hardin unequivocally testified that she believed she was a victim of sexual and racial harassment as far back as 1988, she could not sit on her rights and then sue years later. (pp. 24a-26a)[6] The Magistrate Judge then examined the harassment that allegedly occurred within the 300-day limitations period (after August 16, 1994), and held that such conduct was not motivated by Hardin's gender or race. In fact, the Magistrate Judge concluded that the

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[6] For ease of reference, all citations to the prior court opinions in this case will refer to the page numbers of Petitioner's appendices.

undisputed facts showed that Andersen was equally disrespectful to all coworkers – males and females, blacks and whites. (pp. 28a-29a, 37a) The Magistrate Judge also concluded that even if all of the alleged harassment was considered, including the conduct occurring prior to the limitations period, the totality of the alleged misconduct was not sufficiently severe or pervasive to create an abusive working environment. (pp. 29a, 33a, 37a-38a) As to Hardin's § 1981 claim, the Magistrate Judge concluded that Hardin did not present *any* evidence to show that the Company dealt more favorably with any complaint of any similarly-situated white worker than it dealt with her complaints. (pp. 41a, 43a)

The District Court adopted the recommendation of the Magistrate Judge in its entirety, thereby granting S.C. Johnson's motion for summary judgment and dismissing Hardin's claim. (p. 16a) In addition to adopting the various grounds articulated by the Magistrate Judge for the dismissal of Hardin's Title VII claims, (*i.e.*, the alleged misconduct was not "because of" sex or race, and in any event was not severe or pervasive enough to constitute illegal discrimination), the District Court added yet another ground requiring dismissal. The District Court held that its review of the record confirmed that S.C. Johnson acted reasonably in addressing Hardin's complaints about the rude conduct of her coworker Andersen, and therefore the Company could not be liable under Title VII on Hardin's hostile work environment claim. (pp. 15a-16a)

Hardin appealed the dismissal of her case to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the District Court's entry of summary judgment in favor of S.C. Johnson. (p. 13a) Like the courts before it, the Seventh Circuit rejected the continuing violation doctrine based on Hardin's testimony that she believed she was harassed as early as 1988, and the fact that she filed a written harassment complaint

with S.C. Johnson's human resources department in 1993. (p. 6a) Accordingly, the court analyzed the alleged misconduct of Andersen committed within the 300-day statute of limitations period, and concluded that the undisputed evidence demonstrated that this conduct was not committed "because of" Hardin's sex or race. (pp. 9a-10a) Specifically, the court concluded that Andersen's alleged misconduct was neither sexual nor racial in character. (p. 9a) The court also concluded that there was no evidence that Andersen's alleged misconduct, although gender and race neutral on its face, was motivated by gender or race animus. (pp. 9a-10a) In this regard, the court noted the undisputed evidence that Andersen directed the same rude and boorish conduct towards all employees on the line, including white men, white women, black men, and other black women. (pp. 9a, 12a) In addition to the lack of any evidence of any nexus between the alleged misconduct and Hardin's gender or race, the Seventh Circuit affirmed dismissal of Hardin's Title VII claims because the alleged misconduct simply was not severe enough to rise to the level of an illegal, hostile work environment. (p. 10a)[7]

Regarding Hardin's § 1981 claim, the Seventh Circuit determined:

> We need not consider Hardin's hostile work environment claim under sec. 1981. In a submission to the district court, the plaintiff did not raise this argument, and may have even expressly disavowed such a claim. Because of this, the claim is waived, and we need not address its merits.

(p. 13a) Accordingly, the Seventh Circuit analyzed the only theory Hardin had pursued under § 1981 – that S.C.

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[7] The Seventh Circuit then declined to proceed to analyze whether S.C. Johnson's responses to Plaintiff's complaints were sufficiently reasonable. (p. 10a)

Johnson would have responded more favorably to her complaints of harassment if she had been white – and concluded that she offered no evidence that S.C. Johnson had handled complaints from any white employee in comparable circumstances more solicitously. (pp. 12a-13a)

Hardin then filed with the Seventh Circuit a Petition for Rehearing and Suggestion for Rehearing en Banc. The court denied the petition and suggestion without further elaboration.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S FIRST QUESTION PRESENTED IS BASED ON A FAULTY PREMISE, WAS NOT ARGUED OR DECIDED BELOW, INVOLVES NO CONFLICT BETWEEN THE SEVENTH CIRCUIT AND ANY OTHER COURT, AND IS NOT OUTCOME DETERMINATIVE.

A. Petitioner's First Question Presented Relies On A Faulty Premise.

> Petitioner asserts as the first question presented: In analyzing a claim of unlawful discrimination involving the intersection of both race and gender made by a black female employee, was it improper to compare the black female's treatment only with that of black men and white women?

(Pet. at *i*)

This question relies on a faulty premise because none of the courts below limited their comparison of Andersen's alleged mistreatment of Petitioner only to Andersen's alleged mistreatment of other employees who were black men or white women. Rather, all the courts below concluded that the undisputed evidence demonstrated that Andersen subjected *all* employees on the production line to similar rude and boorish treatment such as his cursing and temper tantrums. As Petitioner

notes, this particular production line consisted of some 8 white males, 2 black males, 3 black females and, from time to time, white and Hispanic females. (Pet. at 4) The Seventh Circuit specifically noted that Petitioner testified in her deposition that "Andersen cursed at all employees on the line, white and black, male and female." (p. 9a) Nowhere in its opinion does the Seventh Circuit indicate that it limited the comparisons to just black males and white females, and ignored the circumstances of white males and black females, as Petitioner claims in her question presented. Therefore, the essential premise of her first question presented is false.

B. Petitioner's First Question Presented Also Turns On A Legal Theory That Was Not Adequately Argued, Developed Or Decided In The Court Below.

Yet a second, independent reason that the Petition should be denied on Petitioner's first question presented is that it turns on the claim that the Seventh Circuit's supposed analysis conflicts with an analytical model adopted by the Courts of Appeals for the Fifth, Ninth and Tenth Circuits. (Pet. at 10-17) This claim simply was not sufficiently argued, developed or decided in the courts below to warrant review here.

Petitioner never asked the Seventh Circuit to follow some alleged analytical model from any other circuit. Indeed, nowhere in either her opening brief or her reply brief to the Seventh Circuit did Petitioner even *cite* any of the cases discussed in her Petition as examples of the analytical model the Seventh Circuit supposedly should have followed, i.e., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); and *Lam v. University of Hawaii*, 40

F.3d 1551 (9th Cir. 1994). Nor did the Seventh Circuit discuss any of these cases on its own initiative. Not only did Petitioner fail to argue to the Seventh Circuit that it should follow some methodology espoused in any of those cases, but she instead told the Seventh Circuit that *no* case law existed that supported her theory:

> What Hardin's complaint articulates is that she was subjected to this treatment because she was [Black and a woman]. [Hardin] contends that it is the inseparability of both race and gender that amounted to how she was treated. A finding of either race or gender is a find [sic] of discrimination for both. **There is no case law relating to whether Black women for a hostile work environment claim are treated differently simply because of their race.** The Plaintiff contends that this case supports that proposition.

(Br. of Appellant at 24-25, emphasis added)

This issue is particularly unsuitable for and unworthy of Supreme Court review because it was not squarely presented, developed or decided in the court below. A long line of this Court's decisions have emphasized the need for a well-developed lower court record on any particular issue as a necessary prerequisite to review by this Court. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before the United States Supreme Court); *see also* Robert L. Stern, et al., *Supreme Court Practice*, at 344 n.92 (7th ed. 1993) (and cases cited therein). The United States Supreme Court is not the appropriate place for Petitioner now to launch her new argument.

C. In Any Event, The Analysis Of The Seventh Circuit In This Case Does Not Conflict With That Of Any Other Court Of Appeals Case Cited By Petitioner.

Yet a third, independent reason that the Petition should be denied on Petitioner's first question presented is that there is no conflict between the Seventh Circuit's analysis in this case and the holding or analysis of any of the other courts of appeals in the cases cited by Petitioner. For example, neither the holding nor the analysis in *Steiner*, 25 F.3d 1459, conflicts with the holding or analysis in this case because there is a fundamental and dispositive difference between the cases. The Ninth Circuit in *Steiner* concluded that the evidentiary record demonstrated that the harasser's abuse of women was qualitatively different than his mistreatment of men in that his abuse of women specifically relied on sexual epithets, offensive and explicit references to women's bodies, and overtly sexual conduct. *Id.* at 1463. On that record, the court concluded that there was sufficient evidence that the harasser's mistreatment of female employees was *because of* their gender. In this case, on the other hand, all of the courts have agreed that the undisputed factual record demonstrates that Andersen treated everyone the same – there was no differential treatment of Petitioner at all. Moreover, unlike the harasser in *Steiner* whose harassment of female coworkers was overtly sexual (thus evidencing that the harassment was because of their sex), none of Andersen's misconduct was sexual or racial in nature. Therefore, the Seventh Circuit did not utilize any analysis that in any way rejects or conflicts with that in the *Steiner* case.

To argue that the *Steiner* case is similar to the case at bar, Petitioner flatly contradicts the findings and conclusions of the Seventh Circuit, the District Court and the Magistrate Judge by claiming that "Andersen's abuse of

Black females was different from that of Black males and white females." (Pet. at 11) The undisputed evidentiary record – the basis for the conclusions of all of the courts below – contained no facts of differential treatment of any kind, whether based on sex, race or a combination of the two. Petitioner cites to the affidavit of Andersen's former girlfriend, Margaret Brannon, which claimed that Andersen made racially and/or sexually derogatory comments in private conversations with Brannon at times between 1991 and 1994 during their intimate relationship. Whereas the harasser in *Steiner* made sexually vulgar comments directly to the victims and thereby polluted their work environment, these derogatory comments alleged by Brannon were made in private to Brannon, and were never heard or known by the Petitioner. Indeed, Petitioner and the two other black female workers on line 374 all confirmed in their testimony that *they **never** heard Andersen make any racially or sexually derogatory comments.* (R. 40, ¶¶ 86-88, 108-109)

The other cases cited by Petitioner are similarly inapplicable. For example, *Jefferies*, 615 F.2d 1025, did not involve a hostile work environment claim at all. *Jefferies* instead involved a claim by a black female that her employer failed to promote her because of her race and sex. The Fifth Circuit made the unremarkable observation that there may be illegal discrimination against a black woman, even in the absence of evidence of discrimination against black men or white women. *Id.* at 1032. The consequence of the *Jefferies* holding is that the mere fact that the employer can show favorable treatment of other employees who share one, but not both, of the plaintiff's protected characteristics does not preclude that plaintiff from establishing her discrimination claim by proving the employer's intent to discriminate based on the combination of those protected characteristics.

Nothing that the Seventh Circuit did in this case in any way conflicts with the holding or analysis in *Jefferies*.

First, in analyzing Petitioner's hostile work environment claims, the Seventh Circuit was not making a disparate treatment analysis based on the *McDonnell Douglas* proof paradigm at all, so *Jefferies* is distinguishable. In a discriminatory treatment case like *Jefferies*, the adverse employment action is usually undisputed. In *Jefferies*, for example, it was undisputed that the employer denied the plaintiff a promotion. Thus, the employer's intent that motivated that adverse action was the key issue. In this hostile work environment case, on the other hand, Petitioner never established that she suffered an adverse action (i.e., differential treatment) because Andersen treated everyone the same. Second, the Seventh Circuit *did* compare the conduct that Andersen directed toward Petitioner to the conduct that he directed toward all other employees, including black men, white men, black females and white females.[8]

Nor does the Seventh Circuit's holding or analysis in any way conflict with the holding or analysis in *Hicks*, 833 F.2d 1406. In *Hicks*, a black female brought a race and sex harassment claim under Title VII. The Tenth Circuit, citing the recently decided case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), remanded the case to the district court for reconsideration of the plaintiff's hostile work environment sexual harassment claim, without expressing any view on the merits of that claim. *Id.* at 1417. The court noted, however, that in evaluating the pervasiveness of the harassment suffered by the plaintiff, it would be permissible (but not mandatory) for the trial

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[8] Petitioner cites *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), but makes no argument that the Seventh Circuit's holding or analysis in this case conflicts with the Fifth Circuit's holding or analysis in that case. A review of the *Phillips* case confirms there is no conflict with the case at bar. Petitioner also fails to point out that the case was vacated. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

court to aggregate evidence of racial harassment with evidence of sexual harassment to determine if the aggregated harassment was sufficiently severe or pervasive to be actionable. *Id.* at 1416.

Nothing that the Seventh Circuit did in this case conflicts with *Hicks*. The court held that all of the alleged harassment, *taken together*, was not sufficiently pervasive to constitute an illegal hostile working environment in violation of Title VII. (p. 10a) The Seventh Circuit did not refuse or fail to aggregate instances of race harassment with instances of sex harassment in determining the pervasiveness issue. Rather, the court clearly took into account all of the alleged misconduct in the relevant timeframe and concluded that the alleged misconduct was not sufficiently pervasive to establish a violation of Title VII. None of that analysis conflicts in any way with *Hicks*.

Finally, nothing in the Seventh Circuit opinion in this case conflicts with *Lam*, 40 F.3d 1551. Like the *Jefferies* case, *Lam* did not even involve hostile work environment claims. Instead, the plaintiff in *Lam* alleged that her employer failed to promote her on the basis of her race, sex and national origin. *Id.* at 1554. Following *Jefferies*, the Ninth Circuit held that when a plaintiff is claiming race and sex bias, the mere fact that the employer can show favorable treatment of other employees who share one, but not both, of the plaintiff's protected characteristics does not preclude that plaintiff from establishing her discrimination claim by proving the employer's intent to discriminate based on the combination of those protected characteristics.

Nothing that the Seventh Circuit did in this case conflicts with *Lam*. First, the cases are dissimilar because *Lam* (like *Jefferies*) did not even involve any hostile work environment claims or discussion of the appropriate analysis of those types of claims. Second, the Seventh Circuit did not look at the sex harassment claim in isolation and

dismiss it because the alleged harasser treated other persons of the same sex (but a different race) similarly. Nor did the Seventh Circuit isolate the race harassment claim and dismiss it by finding that the alleged harasser treated other persons of the same race (but a different gender) similarly. Instead, the Seventh Circuit, like the District Court and the Magistrate Judge before it, concluded that the undisputed facts showed that the alleged harasser mistreated all of the employees on the production line similarly. This included white males – those employees who shared neither race nor gender characteristic of the Petitioner.

In sum, Petitioner's attempt to argue that the Seventh Circuit analysis in this case is somehow in conflict with case law from other circuits is illusory. There is no conflict between the circuits that needs review and reconciliation by this Court in this case.

D. Additionally, And In Any Event, Petitioner's First Question Presented Is Insufficient To Warrant Granting A Writ Because The Issue Presented Is Not Outcome Determinative.

Even if Petitioner had properly characterized the analysis of the Seventh Circuit (which she did not), and even if Petitioner had urged the Seventh Circuit to follow the analysis of the Fifth, Ninth, Tenth or some other circuit (which she did not), and even if the Seventh Circuit's analysis conflicted with case law from other circuits (which it does not), this Court should not grant *certiorari* on Petitioner's first question presented because the issue therein would not change the outcome in this case. Petitioner's entire argument about the Seventh Circuit's reference to similar mistreatment by Andersen of all the other employees on the production line goes only to the very first step in any hostile work environment analysis – determining whether the alleged harassing

conduct was committed because of the Petitioner's sex and/or race. Even if Petitioner could establish this fact, she would still lose the case. Simply showing some act of harassment that is sexual or racial in purpose does not establish a violation of Title VII – a plaintiff then has to satisfy the pervasiveness standard to keep a hostile work environmental claim alive.

> Of course, . . . not all workplace conduct that may be described as "harassment" affects a "term, condition or privilege" of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."

Meritor, 477 U.S. at 67; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

In this case, after concluding that there was no evidence that the alleged harassment within the statute of limitations period was motivated by discrimination, the Seventh Circuit *also* expressly concluded that those allegedly harassing acts "were insufficiently severe to give rise to a hostile environment." (p. 10a) This conclusion was also reached by the District Court and the Magistrate Judge. (p. 16a and p. 29a) Indeed, the Magistrate Judge concluded that the totality of all of Andersen's alleged sexual harassment of the Petitioner, including those acts which fell outside the statute of limitations period, was "not sufficiently severe or pervasive so as to alter the conditions of Hardin's working environment and create an abusive working atmosphere." (p. 33a)

Petitioner offers no challenge to the Seventh Circuit's holding that Andersen's alleged misconduct does not reach the minimum threshold necessary to establish a violation of Title VII. Therefore, even if Petitioner somehow could prevail on her arguments regarding the first

step in the analysis, this would still not warrant a reversal of the judgment below.

Another reason Petitioner's first issue is not outcome determinative is that the District Court held that S.C. Johnson could not be liable to Petitioner on her Title VII claims in any event because the Company acted reasonably in addressing her complaints. (pp. 15a-16a)[9] This Court recently reconfirmed the broad unanimity among the holdings of district courts and courts of appeal that an employer is liable for coworker harassment only if it knew or should have known of the conduct, and negligently failed to take prompt and appropriate corrective action. *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2289 (1998) In this case, no matter how the harassing acts are analyzed, and even if one concluded they constituted illegal harassment by Andersen, Petitioner would still lose her case at the summary judgment stage because S.C. Johnson acted reasonably in response to her complaints. This was the express conclusion of the District Court, and nothing raised by Petitioner now challenges or affects that conclusion. Therefore, Petitioner's Title VII claims still fail as a matter of law even if Petitioner were somehow to prevail on her first question presented in her Petition. Accordingly, that issue is not worthy of review by this Court.

II. PETITIONER'S SECOND QUESTION PRESENTED SIMILARLY RAISES NO ISSUE THAT MERITS REVIEW BY THIS COURT.

In her second question presented and supporting argument, Petitioner now argues, for the first time in this

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[9] The Seventh Circuit found it unnecessary to reach and analyze this issue because Petitioner "cannot establish that she was subjected to either gender or racial discrimination creating a hostile work environment." (p. 10a)

case, that Andersen was a supervisor and therefore that the Seventh Circuit erred by not analyzing her claims pursuant to the standards set forth in *Faragher* and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

A. Petitioner's Second Question Presented Relies On A Faulty Premise That Misstates The Undisputed Facts.

Petitioner's second question presented, and section II of Petitioner's argument, both rely on Petitioner's assertion that Andersen was Petitioner's supervisor. Working from that necessary premise, Petitioner argues that the Seventh Circuit improperly ignored the standards for employer liability based on discriminatory conduct of supervisors set forth in *Ellerth* and *Faragher*. However, this fundamental premise of Petitioner's argument is wrong and contradicts the undisputed facts.

As part of its submission in support of its motion for summary judgment, S.C. Johnson offered the following proposed finding of fact:

> The line chief, like the other service persons, was an hourly worker and was not a member of management. The line chief had some scheduling and production-related duties, but was not the supervisor of the other persons on the line.

(R. 40, ¶ 10) In response to this proposed finding, Petitioner confirmed: "No genuine issue of material fact exists." (R. 48, ¶ 10) Additionally, other undisputed facts similarly confirm that the line chief was not a managerial position, had no authority to hire or fire employees, could not issue discipline of his own authority, could not do performance evaluations of the other service persons, and could not determine any pay increases or other benefits for any of the service persons. (R. 40, ¶¶ 11, 12; R. 48, ¶¶ 11, 12) Moreover, the undisputed facts confirm that at no time during the limitations period relevant to Petitioner's Title VII claims was Andersen even a line chief.

The position of line chief ended in the spring of 1993 when S.C. Johnson reorganized its workforce into work teams. (R. 40, ¶¶ 13, 18) From the spring of 1993 forward, Andersen was merely one of the co-equal members of the team. In fact, the "administrative role" – the person responsible for the team's administrative duties such as scheduling production and breaks that were formerly handled by the line chief – was mainly handled by one of the team members who was a black female. (R. 40, ¶ 35)

Without any citation to the record, and without any reference to any supporting facts, Petitioner now simply makes the conclusory statement that Anderson was her "supervisor." (Pet. at 18) Petitioner's entire second question presented should be rejected because this unsupported assertion simply is not true. Petitioner has already conceded in the evidentiary record that Andersen, even when he was a line chief, was not her supervisor. In sum, Petitioner's unsupported assertion that this is a case involving harassment by a supervisor subject to the analytical standards set forth in *Ellerth* and *Faragher* is misleading and disingenuous.

B. The Issue In Petitioner's Second Question Presented Was Not Argued, Developed Or Decided In The Court Below.

A second, independent reason Petitioner's second question should not be accepted for review is that Petitioner never argued to the Seventh Circuit that her Title VII claims should be analyzed pursuant to the standards set forth in *Ellerth* and *Faragher*. This is remarkable because this Court's opinions in *Ellerth* and *Faragher* were issued on June 26, 1998. Petitioner filed her opening brief with the Seventh Circuit weeks later in July 1998. Nowhere in that brief did the Petitioner argue that Andersen was a supervisor. In fact, Petitioner did not even cite either *Ellerth* or *Faragher*.

Because Petitioner in her opening brief to the Seventh Circuit referred in passing to Andersen as a supervisor, S.C. Johnson in its opposition brief argued that this reference was a misstatement of the undisputed factual record, and that Andersen was not a supervisory employee. (Response Brief at 24, n.9) Despite this express challenge to the notion of Andersen as a supervisor, Petitioner did not in her reply brief attempt to argue that Andersen was a supervisor. Nor did Petitioner cite either *Ellerth* or *Faragher* in that reply brief. Similarly, Petitioner did not cite *Ellerth* or *Faragher* in her Petition for Rehearing and Suggestion for Rehearing en Banc that she filed in February 1999.

Obviously, Petitioner's argument that Andersen was a supervisor and that the Seventh Circuit improperly failed to follow the standards set forth in *Ellerth* and *Faragher* is a brand-new notion. Petitioner wants this Court to correct a supposed error that was never made, on an issue that she never raised. Clearly, this is not the kind of well-developed and fully-litigated issue that is appropriate for Supreme Court review. *See Youakim*, 425 U.S. at 234; *Delta Air Lines, Inc.*, 450 U.S. at 362. Because Petitioner never asserted that the *Ellerth* or *Faragher* standards applied to this case, there is no decision from the lower court on this issue that needs or justifies review.

C. Petitioner's Argument On Her Second Question Presented Rests On Patently Incorrect Characterizations Of The Law.

In argument section II of the Petition, Petitioner argues at some length that the Seventh Circuit erred by applying Title VII's 300-day statute of limitations to her Title VII claims. (Pet. at 22-23) Although it is not entirely clear how that statute of limitations analysis relates to the gist of Petitioner's argument in this section (regarding

Andersen's status as an alleged supervisor and the application of *Ellerth* and *Faragher*), Petitioner's argument in any event is plainly wrong. First, Petitioner amazingly asserts that "the 300-day limitation period is not a statutory approach; it is a judicial creation." (Pet. at 21) This, of course, is not true. Title VII's statute of limitation is codified at 42 U.S.C. § 2000e-5(e). Petitioner asks the Court to read the statute of limitations section right out of the statute.

Second, Petitioner incorrectly asserts that the Seventh Circuit relied on the continuing violation doctrine to exclude from its consideration certain "evidence of discriminatory treatment." (Pet. at 21) The Seventh Circuit did no such thing. Directly contrary to Petitioner's characterization, the Court merely applied the statute of limitations to define the relevant time period, and rejected Petitioner's request that it apply the continuing violation doctrine to reach back beyond the limitations period. (pp. 6a-7a) The Court appropriately determined that the continuing violation doctrine was inapplicable to the facts in this case because it is clear beyond any possible dispute that Petitioner believed she was a victim of harassment years before she filed her complaint with the appropriate state agency. (*Id.*) She said so in her deposition testimony. (R. 40, ¶¶ 40, 45-46) Accordingly, for purposes of assessing her Title VII claims, she could not reach back to earlier time periods and rely on evidence of events that occurred prior to the 300 days before she filed her complaint. (*Id.*) Nothing the Seventh Circuit did in this analysis was in any way extraordinary, and not even Petitioner claims that the Court's analysis or holding in this regard conflicts with any analysis or holding of this or any other court.

Also within argument section II of her Petition, Petitioner argues about the dismissal of her claim pursuant to 42 U.S.C. § 1981. She claims that the Seventh Circuit erred by failing to evaluate her hostile work environment claim

pursuant to § 1981 based on evidence of Andersen's misconduct going back over six years – the limitations period applicable to § 1981 claims filed in Wisconsin – rather than just the 300-day period applicable under Title VII. (Pet. at 24) This, too, is wrong because, as found by Seventh Circuit, Petitioner *waived* any hostile work environment claim under § 1981. (p. 13a) Instead, the only liability theory asserted by Petitioner relevant to her race discrimination claim pursuant to § 1981 was the disparate treatment theory that S.C. Johnson would have responded even more favorably to her complaints if she were white. Like the District Court and Magistrate Judge before it, the Seventh Circuit held that Petitioner's § 1981 claim failed as a matter of law because Petitioner failed to produce *any* evidence to create any inference that S.C. Johnson treated her less favorably because of her race. (pp. 12a-13a) In any event, there is clearly no issue presented here that would require or justify review by this Court. Petitioner's entire argument regarding her § 1981 claim exclusively represents fact-bound issues, and her suggestion, albeit wrong, that the Seventh Circuit erred in evaluating her § 1981 claim. There is no issue of national importance, and no need to advance or clarify the law in some important aspect, presented by Petitioner's § 1981 claim, or by Petitioner's second question presented.

D. Furthermore, Petitioner's Second Question Presented Seeks Only The Correction Of Alleged Error.

Petitioner asks in her second question presented whether racial and sexual comments privately made by a supervisory employee, even if not directed to or heard by the Petitioner, are relevant to the issue of the general pervasiveness of harassment in the workplace. (Pet. at *i*) As articulated, this convoluted question mixes multiple legal issues, and does not merit or justify review. First, as

already discussed, the alleged harasser in this case was not a supervisor. Second, this issue was not presented to or decided by the Seventh Circuit. Third, even if this question was factually correct (which it is not), and even if it was developed and decided in the court below (which it was not), Petitioner's claims amount to nothing more than a request that this Court correct allegedly erroneous factual findings or some alleged misapplication of a properly stated rule of law. As confirmed by this Court's Rule 10, these are not appropriate considerations justifying the granting of a writ. There is no alleged conflict among the lower courts that requires reconciliation and guidance, and there is no important issue of public policy to be decided or advanced raised by Petitioner's second question presented.

CONCLUSION

For all of the foregoing reasons, the Respondent S.C. Johnson & Son, Inc. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated this 12th day of August, 1999.

Respectfully submitted,

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